

STATE OF MICHIGAN
COURT OF APPEALS

JASON MICHAEL MILES and ALISON JOERSZ,

Plaintiffs-Appellants,

v

LOREN M. DICKSTEIN, RANDALL M. LEWIS,
and LEWIS & DICKSTEIN, PLLC,

Defendants-Appellees.

UNPUBLISHED

September 10, 2020

No. 350136

Oakland Circuit Court

LC No. 2018-168353-NM

Before: LETICA, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM.

This legal malpractice case arises from plaintiff Jason Michael Miles’s jury trial conviction of criminal sexual conduct in the second degree. Miles contends that but for the professional negligence of defendants Loren M. Dickstein and Randall M. Lewis, his retained counsel in the criminal case, he likely would have been acquitted. The circuit court granted summary disposition under MCR 2.116(C)(7), finding Miles’s claims barred by the doctrine of collateral estoppel. We affirm that ruling.

I

Miles’s conviction rested on the testimony of his teenaged stepdaughter, who recounted numerous acts of sexual assault committed six to 10 years earlier. The complainant asserted that she had suppressed her memories of Miles’s acts until she looked up the meaning of the word “molestation,” which triggered her recall. *People v Miles*, unpublished per curiam opinion of the Court of Appeals, issued July 17, 2018 (Docket No. 335731) (SHAPIRO J., dissenting), p 1.

After he was convicted, Miles moved in the trial court for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), alleging that his counsel had performed ineffectively before and during the trial. Miles primarily asserted that his counsel should have retained an expert witness capable of testifying on the subject of recovered memory. The trial court denied Miles’s motion for a hearing. This Court affirmed, holding in relevant part that based on the record presented to the panel, Miles failed to demonstrate that his counsel performed ineffectively. *Miles*, unpub op at 2-14. This Court’s majority opinion summarized: “[D]efense

counsel's strategy was the reasonable product of an adequate investigation and that defendant's [ineffective assistance] claim is without merit." *Id.* at 4. The majority declined to "second-guess defense counsel's strategy, especially when the strategy was largely successful, leading to defendant's acquittal of the four most-serious charges against him." *Id.* The Supreme Court denied Miles's application for leave to appeal. *People v Miles*, 503 Mich 1032; 926 NW2d 806 (2019).

Miles filed this legal malpractice case on the same day that he applied for leave to appeal the criminal case in the Supreme Court. The circuit court granted summary disposition on the ground of collateral estoppel after the Supreme Court denied leave to appeal.

II

The dispositive issue is whether the doctrine of collateral estoppel bars Miles's legal malpractice claims. Under Michigan's law of issue preclusion (collateral estoppel), a legal issue may not be relitigated if "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *People v Trakhtenberg*, 493 Mich 38, 48; 826 NW2d 136 (2012) (quotation marks and citation omitted). Miles challenges only the second element: that he had a "full and fair opportunity to litigate" the conduct of his counsel. He contends that absent a *Ginther* hearing, he was deprived of the ability to effectively test whether his counsel performed within the standard of care. We review de novo whether collateral estoppel applies. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

"[T]he legal standards for ineffective assistance of counsel in criminal proceedings and for legal malpractice in civil proceedings are equivalent for purposes of application of the doctrine of collateral estoppel." *Barrow v Pritchard*, 235 Mich App 478, 481; 597 NW2d 853 (1999) (quotation marks and citation omitted). Under either analysis, the touchstone is the reasonableness of trial counsel's actions and choices. *Id.* at 485. Because the two standards are virtually identical, this Court has repeatedly held that "where a full and fair determination has been made in a previous criminal action that the client received the effective assistance of counsel, the defendant-attorney in a subsequent civil malpractice action brought by the same client may defensively assert collateral estoppel as a bar." *Knoblauch v Kenyon*, 163 Mich App 712, 725; 415 NW2d 286 (1987). See also *Schlumm v Terrence J O'Hagen, PC*, 173 Mich App 345, 356; 433 NW2d 839 (1988); *Barrow*, 235 Mich App at 483. Citing *Barrow*, the Supreme Court specifically observed in *Trakhtenberg* that "[s]everal Court of Appeals opinions have held that a criminal defense attorney may rely on the doctrine of collateral estoppel in order to avoid malpractice liability when a full and fair determination was made in a previous criminal action that the same client had received effective assistance of counsel." *Trakhtenberg*, 493 Mich at 48. The Supreme Court did not call those rulings into question in *Trakhtenberg*, and Miles has not cited a single case offering an alternative analysis.

Nor has Miles demonstrated that he was deprived of a "full and fair opportunity to litigate" his ineffectiveness of counsel claims. In *Ginther*, the Supreme Court held that if the trial court record does not "factually support" the claims a defendant advances on appeal, the defendant "should . . . seek to make a separate record factually supporting the claims." *Ginther*, 390 Mich at 443. The Court expounded:

A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the processes of the appellate courts except in the rare case where the record manifestly shows that the judge would refuse a hearing; in such a case the defendant should seek on appeal, not a reversal of his conviction, but an order directing the trial court to conduct the needed hearing. [*Id.* at 443-444.]

In some cases, however, the record on appeal is adequate to evaluate counsel's effectiveness. See, e.g., *People v Chapo*, 283 Mich App 360, 369; 770 NW2d 68 (2009) ("Further, we are not persuaded that defendant has demonstrated any issue for which further factual development would advance his claim."). Accordingly, a *Ginther* hearing is not required to fully and fairly adjudicate *all* ineffectiveness claims.

A majority of the appellate panel that considered Miles's ineffective assistance of counsel arguments concluded that a remand for further factual development was unnecessary because facts within the record established that counsel had not performed ineffectively. Moreover, the majority reached this result despite a dissent written by Judge SHAPIRO urging that a *Ginther* hearing was essential. Judge SHAPIRO forcefully opined that Miles's claims of error "cannot be properly reviewed without a *Ginther* hearing." But this position did not prevail.

The salient take-away is that Miles has been afforded a full and fair opportunity to litigate whether he was entitled to a *Ginther* hearing—precisely the same issue that he now presses in the appeal before us. This Court definitively determined that Miles was afforded a full and fair opportunity to litigate his ineffective assistance of counsel claims in the trial court, and that a remand for further factual development was unnecessary. Despite Judge SHAPIRO's dissent, the Supreme Court evidently found no basis for disturbing the majority's ruling.

In addition to Miles's claim that his counsel performed below the standard of care by failing to obtain a recovered memory expert, Miles posits that his counsel negligently failed to object to certain testimony that Miles contends was inadmissible and highly prejudicial, and neglected to obtain the complainant's counseling records. Miles raised these contentions in the appeal of his conviction. The majority addressed them and rejected that counsel had performed ineffectively in any regard. This Court's holdings that Miles was not entitled to an evidentiary hearing and that his counsel did not perform ineffectively preclude relitigation of the same claims in this legal malpractice action.

We affirm.

/s/ Anica Letica
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher